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PATENT APPLICATION

09/776,130

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**In the United States Patent and Trademark Office
on Appeal from the Examiner to the Board
of Patent Appeals and Interferences**

In re Application of: Dimitra G. Gerogianni
Serial No.: 09/776,130
Filing Date: February 2, 2001
Group Art Unit: 3677
Examiner: Flemming Saether
Title: *System and Method for Brokering Food Order
Transactions Among a Plurality of Unaffiliated Sellers*

MAIL STOP: APPEAL BRIEF-PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Dear Sir:

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Willie Jiles

Willie Jiles

Date: October 20, 2004.

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Appeal Brief

Appellant has appealed to the Board of Patent Appeals and Interferences from the decision of the Examiner mailed April 20, 2004, finally rejecting Claims 1-37. Appellant filed a Notice of Appeal on August 20, 2004. Appellant respectfully submits this Appeal Brief with the statutory fee of \$340.00.

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Real Party in Interest

This application is currently owned by i2 Technologies US, Inc., as indicated by:
an assignment recorded on February 2, 2001, in the Assignment Records of the United States Patent and Trademark Office at Reel 011527, Frames 0965-0966; and
an assignment recorded on July 30, 2001, in the Assignment Records of the United States Patent and Trademark Office at Reel 012033, Frames 0649-0660.

Related Appeals and Interferences

No known appeals, interferences, or judicial proceedings are related to or will directly affect or have a bearing on the Board's decision on this Appeal. The Board's decision on this Appeal will not affect any known appeals, interferences, or judicial proceedings.

Status of Claims

Claims 1-37 are pending in this application and all stand rejected under a Final Office Action mailed February 12, 2004. Appellant presents Claims 1-37 for appeal. Appendix A shows all pending claims.

Status of Amendments

The Examiner has entered all amendments filed subsequent to the Final Office Action mailed July 20, 2004.

Summary of Invention

In particular embodiments, system 10 for brokering food order transactions among a plurality of unaffiliated sellers includes one or more customers 12, one or more restaurants 14, and at least one server 16 associated with a website or other environment accessible to customers 12 and restaurants 14. (Page 7, Lines 2-5). In general, server 16 receives a request for a food item from a customer 12 and, in response, generates and provides to customer 12 a list of restaurants 14 from which the requested food item is available and which deliver to the

location of customer 12. (Page 7, Lines 5-9). The list preferably excludes all restaurants 14 from which the requested food item is not available or which do not deliver to the location of customer 12. (Page 7, Lines 9-10). For each restaurant 14 on the list, the list may reflect pricing information for the requested food item and substantially real-time delivery time information for purposes of comparison by customer 12 or automatically. (Page 7, Lines 11-13). The listed sellers may be ranked according to such information. (Page 7, Lines 13-14). Server 16 may initiate a food order transaction with a restaurant 14 selected from the list by customer 12 or automatically. (Page 7, Lines 14-15). To perform these or any other tasks, server 16 may use a food order transaction broker 18, customer information 20, and restaurant information 22. (Page 7, Lines 15-17).

In particular embodiments, associated with server 16 are one or more databases, at one or more locations integral to or separate from server 16, containing customer information 20 and restaurant information 22. (Page 8, Lines 11-13). Customer information 20 for a customer 12 may include customer delivery information, customer preference information, customer payment information, or any other suitable information associated with customer 12. (Page 8, Lines 15-17). Customer delivery information for a customer 12 may include any suitable information relating to contacting and delivering to customer 12, such as a deliver-to address including a street address and preferably a city, zip code, or both; one or more telephone numbers or portions thereof, such as an area code; or special delivery instructions. (Page 8, Lines 18-22).

In particular embodiments, customer preference information for a customer 12 may include any information relating to the personal preferences of customer 12. (Page 8, Lines 23-24). For example, in one embodiment, the customer preference information for customer 12 may include maximum and/or minimum price preferences, maximum delivery time preferences, and restaurant rating preferences of customer 12. (Page 8, Lines 24-27). A particular preference of a customer 12 may be represented in any appropriate manner. (Page 8, Lines 27-28). For example only and not by way of limitation, the customer preference

information for customer 12 may indicate that delivery time is “very important,” “important,” or “unimportant” to customer 12 or, more specifically, that a delivery time of more than thirty minutes is unacceptable to customer 12. (Page 8, Line 28, through Page 9, Line 3). Price preferences, restaurant rating preferences, and any other appropriate customer preferences may be similarly represented. (Page 9, Lines 3-4). Customer payment information for a customer 12 may include any information relating to payment by customer 12 for food items, such as a preferred method of payment, a credit card number, or any other suitable payment information. (Page 9, Lines 5-7).

In particular embodiments, restaurant information 22 for a restaurant 14 may include any suitable information associated with the restaurant 14, such as food availability information, pricing information, delivery area information, delivery time information, and rating information for restaurant 14. (Page 9, Lines 19-22). Food availability information for a restaurant 14 may include any information relating to the availability of one or more food items from restaurant 14 and may be substantially real-time in that the food availability information may be updated by restaurant 14 as needed to reflect the current availability of food items from restaurant 14. (Page 9, Lines 23-27). For example, if a restaurant 14 suddenly runs out of a food item or an ingredient of a food item such that the food item may not be prepared or is otherwise currently unavailable from restaurant 14, restaurant 14 may update its food availability information so that customers 12 accessing server 16 may be notified accordingly. (Page 9, Line 27, through Page 10, Line 2). Pricing information for a restaurant 14 may include any information reflecting the prices of food items offered by restaurant 14, such as regular prices or any “specials” currently being offered. (Page 10, Lines 3-5). Pricing information for restaurant 14 may be substantially real-time in that restaurant 14 may update the pricing information as needed to reflect the current prices of food items available from restaurant 14. (Page 10, Lines 5-7).

In particular embodiments, delivery area information for a restaurant 14 may include any information relating to the geographical area within which restaurant 14 may deliver or

arrange for delivery of food items, such as a listing of cities, zip codes, neighborhoods, streets, or other geographic identifiers. (Page 10, Lines 8-11). Delivery time information for a restaurant 14 may include any information relating to the delivery time for food items ordered from restaurant 14. (Page 10, Lines 12-13). For example, delivery time information may reflect a current order backlog at restaurant 14 for all food items or a particular food item, the amount of time it may take restaurant 14 to prepare all food items or a particular food item, and the travel time from restaurant 14 to various locations. (Page 10, Lines 13-17). Delivery time information may reflect one or more actual delivery times for restaurant 14 or an estimated delivery time that is based on one or more actual delivery times for restaurant 14 within a prescribed time period, such as a predetermined time period preceding a request received from a customer 12. (Page 10, Lines 17-20). Delivery time information for restaurant 14 may be substantially real-time in that it may be updated by restaurant 14 or otherwise as needed to reflect the current delivery time for restaurant 14. (Page 10, Lines 20-23). Delivery time information may vary for different food items for the same restaurant 14. (Page 10, Lines 23-24).

In particular embodiments, broker 18 may perform a number of tasks associated with brokering food order transactions among multiple unaffiliated restaurants 14. (Page 11, Lines 5-6). Broker 18 receives requests for food items from customers 12 and, in response, generates corresponding lists of restaurants 14 according to appropriate criteria. (Page 11, Lines 6-8). Broker 18 may generate a list of restaurants 14 according to a comparison of the availability information for one or more restaurants 14 with the one or more food items identified in the customer request. (Page 11, Lines 8-11). For example, if customer 12 has requested a pepperoni pizza, broker 18 may exclude from the list of restaurants 14 those restaurants 14 at which pepperoni pizza is not currently available. (Page 11, Lines 13-16). Broker 18 may also generate the list of restaurants 14 according to a comparison of the customer delivery information for customer 12 with the delivery area information for each restaurant 14, excluding from the list those restaurants 14 that do not deliver to the location of customer 12. (Page 11, Lines 13-16). Broker 18 may further generate the list of restaurants

14 according to a comparison of the customer preference information for customer 12 with the pricing information, delivery time information, and/or rating information for each restaurant 14, excluding from the list those restaurants 14 that do not satisfy some or all of the preferences of customer 12. (Page 11, Lines 16-20). For example, if customer preference information for customer 12 indicates that a delivery time longer than thirty minutes is unacceptable, broker 18 may exclude from the list those restaurants 14 with a current delivery time longer than thirty minutes. (Page 11, Lines 21-23). Broker 18 may determine the preferences of customer 12 by accessing stored customer information 20 for customer 12 or by eliciting from customer 12 any special instructions or the like applicable to a submitted request. (Page 11, Lines 24-26). Broker 18 may generate the list of restaurants 14 according to any of the criteria described above, singly or in any suitable combination and without limitation. (Page 11, Lines 26-28).

In particular embodiments, after a list of restaurants 14 has been generated, broker 18 may initiate a food order transaction with a particular restaurant selected from the list by customer 12 or otherwise. (Page 13, Lines 6-8). In one embodiment, broker 18 communicates the generated list(s) of restaurants 14 to customer 12, receives from customer 12 a selection of a particular restaurant 14 on the list, and initiates a food order transaction with the selected restaurant 14 in response to the selection. (Page 13, Lines 8-11). One or more lists of restaurants 14 may be provided to customer 12 in any suitable manner. (Page 13, Lines 11-12). For example, a list may be provided to customer 12 in HTML format for rendering and display using an associated web browser. (Page 13, Lines 13-14). Alternatively, broker 18 may select a particular restaurant 14 automatically before initiating the transaction, with or without prompting from customer 12 and perhaps without communicating any list to customer 12. (Page 13, Lines 14-17). Broker 18 may automatically select a restaurant for customer 12 according to any suitable criteria. (Page 13, Lines 17-18). For example, in one embodiment, broker 18 compares the customer preference information for customer 12 with restaurant information 22, such as price, delivery time, and rating, for each restaurant 14 on the list and selects the particular restaurant 14 that customer

12 would most likely select in light of the customer preference information. (Page 13, Lines 18-22).

Statement of Issue

Are independent Claims 1, 13, and 23-24 patentable over U.S. Patent No. 5,991,739 to Cupps et al. ("*Cupps*") in view of U.S. Patent No. 4,971,406 to Hanson ("*Hanson*") and in further view of U.S. Patent No. 5,895,454 to Harrington ("*Harrington*") under 35 U.S.C. § 103(a)?

Grouping of Claims

Appellant has made an effort to group claims together to reduce the burden on the Board. The Board may group all claims together.

Argument

The rejection of independent Claims 1, 13, and 23-34 based on *Cupps* in view of *Hanson* and in further view of *Harrington* under 35 U.S.C. § 103(a) is improper, these claims are clearly patentable over the proposed *Cupps-Hanson-Harrington* combination, and the Board should therefore reverse the rejection.

A. Overview

The Examiner rejects Claims 1, 13, and 23-34 under *Cupps* in view of *Hanson* and in further view of *Harrington*. Appendix B includes a copy of *Cupps*. Appendix C includes a copy of *Hanson*. Appendix D includes a copy of *Harrington*.

B. Standard

The question raised under 35 U.S.C. § 103 is whether the prior art taken as a whole would suggest the claimed invention taken as a whole to one of ordinary skill in the art at the time of the invention. *See* 35 U.S.C. § 103(a) (2000). Accordingly, even if all elements of a claim are disclosed in various prior art references, which is certainly not the case here as discussed below, the claimed invention taken as a whole cannot be said to be obvious without some reason given in the prior art why one of ordinary skill at the time of the invention would have been prompted to modify the teachings of a reference or combine the teachings of multiple references to arrive at the claimed invention.

The M.P.E.P. sets forth the strict legal standard for establishing a *prima facie* case of obviousness based on modification or combination of prior art references:

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references where combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure.

M.P.E.P. ch. 2142 (Rev. 2, May 2004) (citations omitted). "To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. All words in a claim must be considered in judging the patentability of that claim against the prior art." M.P.E.P. ch. 2143.03 (Rev. 2, May 2004) (citations omitted).

In addition, the M.P.E.P. and the Federal Circuit repeatedly warn against using an applicant's disclosure as a blueprint to reconstruct the claimed invention. For example, the M.P.E.P. states, "The tendency to resort to 'hindsight' based upon applicant's disclosure is often difficult to avoid due to the very nature of the examination process. However, impermissible hindsight must be avoided and the legal conclusion must be reached on the

basis of the facts gleaned from the prior art.” M.P.E.P. ch. 2142 (Rev. 2, May 2004). The governing Federal Circuit cases are equally clear.

A critical step in analyzing the patentability of claims pursuant to [35 U.S.C. § 103] is casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field. . . . Close adherence to this methodology is especially important in cases where the very ease with which the invention can be understood may prompt one “to fall victim to the insidious effect of a hindsight syndrome wherein that which only the invention taught is used against its teacher.”

In re Kotzab, 217 F.3d 1365, 1369, 55 U.S.P.Q.2d 1313, 1316 (Fed. Cir. 2000) (citations omitted).

C. *Cupps*

Cupps merely discloses an online ordering machine that manages distribution of home delivered products. (Abstract). The online ordering machine provides customers product information from various vendors and accepts orders from the customers for a given product from a given vendor. (Abstract). A vendor web page is displayed to the customer based on a generalized category of a product, such as "pizza," and lists vendors selling that general category of product. (Figure 8 and Column 9, Lines 16-23). A menu web page that lists the menu items for a given vendor may also be displayed to the customer. (Figure 9 and Column 9, Lines 24-33). The customer may then browse these web pages, select an item of interest for delivery, and receive a notification of an estimated delivery time for the item. (Column 10, Lines 11-16 and Column 11, Lines 24-27).

D. *Hanson*

Hanson merely discloses a data entry terminal used by a business able to receive input regarding a customer order and transmit that information to a remote station. (Column 1, Lines 25-64). For example, an employee of a restaurant may enter a customer order into the terminal and the terminal will transmit the ordering information to the kitchen. (Column 1, lines 25-64). A central processing system may estimate a delivery time to a customer and

notify the data entry station if an unusual delay in delivery is expected. (Column 16, Lines 64-68).

E. Harrington

Harrington merely discloses a system for networking commercial transactions so a local user can conduct business with a remote vendor. (Column 2, Lines 10-16). The system utilizes a hierarchical menu system allowing a local user to select a vendor in a given area of the world and further refine the search to specific countries and cities. (Column 5, Lines 25-34). The system may also use a hierarchical menu system to allow a local user to select a desired category of product or service and further refine the search to a specific product or service. (Column 5, Lines 35-40).

F. Independent Claims 1, 13, and 23-34 are Patentable over the Proposed Cupps-Hanson-Harrington Combination

For at least the following reasons, independent Claims 1, 13, and 23-24 are clearly patentable over the proposed *Cupps-Hanson-Harrington* combination. Accordingly, the Board should reverse the rejection of independent Claims 1, 13, and 23-24 and instruct the Examiner to issue a notice of allowance of all claims.

The Examiner has Failed to Establish *Prima Facie* Obviousness

The Examiner has failed to properly establish a *prima facie* case of obviousness with respect to the proposed *Cupps-Hanson-Harrington* combination on which the Examiner relies to reject independent Claims 1, 13, and 23-24. In the Response mailed February 11, 2004, Appellant noted that the Examiner had merely stated that it would have been obvious to combine *Cupps*, *Hanson*, and *Harrington* with each other as proposed, without demonstrating that *Cupps*, *Hanson*, *Harrington*, or knowledge generally available to a person having ordinary skill in the art at the time of the invention would have provided the required

teaching, suggestion, or motivation to combine *Cupps*, *Hanson*, and *Harrington* as proposed. In the Final Office Action mailed April 20, 2004, the Examiner responds that,

as should be self evident from the above rejections, the examiner has not “merely stated that at the time the present invention was made it would have been obvious for one of ordinary skill in the art to combine the teachings of *Cupps*, *Harrington*, *Hanson* and *Cotter*” as suggested by applicant. Applicant is referred back to the above rejections for the motivations and since applicant is not specific, no further response is believed necessary.

Appellant disagrees with the Examiner. With respect to combining *Hanson* with *Cupps*, the Examiner merely states that “it would have been obvious . . . to communicate the real time delivery time to the customer in *Cupps* prior to the order being placed so that the customer could make a more informed decision.” With respect to combining *Harrington* with *Cupps*, the Examiner merely states:

it would have been obvious . . . to communicate the real time delivery time to the customer in modified *Cupps* in a manner as disclosed in *Harrington* so that delivery time could be used by the customer as criteria for determining which food item to order before beginning any transaction.

In each case, the Examiner merely asserts that it would have been obvious to combine *Cupps* with *Hanson* or *Harrington* as proposed to achieve a certain purported result, i.e., enabling a customer to “make a more informed decision” or “use[] [delivery time] as criteria for determining which food item to order before beginning any transaction.” Appellant respectfully submits that, for at least the following reasons, such assertions fail to demonstrate that *Cupps*, *Hanson*, *Harrington*, or knowledge generally available to a person having ordinary skill in the art at the time of the invention would have provided any teaching, suggestion, or motivation to combine the references with each other as proposed and further that a person having ordinary skill in the art at the time of the invention would have reasonably expected the proposed combination to achieve the purported results, as required by the M.P.E.P. and governing Federal Circuit case law.

Nowhere does the Examiner demonstrate, with respect to either proposed combination, that *Cupps*, *Hanson*, *Harrington*, or knowledge generally available to a person having ordinary skill in the art at the time of the invention would have provided any teaching, suggestion, or motivation whatsoever to make the proposed combination. As an example, the Examiner merely asserts that combining the system of *Hanson* with the system of *Cupps* would have enabled the system of *Cupps* to “communicate the real time delivery time to the customer . . . prior to the ordered being placed,” without even attempting to demonstrate that such a teaching, suggestion, or motivation can be found in *Cupps*, *Hanson*, or knowledge generally available to a person having ordinary skill in the art at the time of the invention. As another example, the Examiner merely asserts that combining the system of *Harrington* with the system of *Cupps* would have enabled the system of *Cupps* to “communicate the real time delivery time to the customer . . . so that delivery time could be used by the customer as criteria for determining which food item to order before beginning any transaction,” without even attempting to demonstrate that such a teaching, suggestion, or motivation can be found in *Cupps*, *Harrington*, or knowledge generally available to a person having ordinary skill in the art at the time of the invention.

Moreover, nowhere does the Examiner demonstrate that a person having ordinary skill in the art at the time of the invention would have reasonably expected the proposed combinations to achieve the purported results. First, nowhere does the Examiner demonstrate that the proposed combinations would have in fact produced the purported results. As an example, nowhere does the Examiner even attempt to demonstrate that combining the system of *Hanson* with the system of *Cupps* would have actually enabled the system of *Cupps* to “communicate the real time delivery time to the customer . . . prior to the ordered being placed.” As another example, nowhere does the Examiner even attempt to demonstrate that combining the system of *Harrington* with the system of *Cupps* would have actually enabled the system of *Cupps* to “communicate the real time delivery time to the customer . . . so that delivery time could be used by the customer as criteria for determining which food item to order before beginning any transaction.” Second, even assuming for the sake of argument

that the proposed combinations would have produced the purported results, nowhere does the Examiner demonstrate that a person having ordinary skill in the art at the time of the invention would have reasonably expected such results. As an example, the Examiner merely asserts that combining the system of *Hanson* with the system of *Cupps* would have enabled the system of *Cupps* to “communicate the real time delivery time to the customer . . . prior to the ordered being placed,” without even attempting to demonstrate that a person having ordinary skill in the art at the time of the invention would have reasonably expected such result. As another example, the Examiner merely asserts that combining the system of *Harrington* with the system of *Cupps* would have enabled the system of *Cupps* to “communicate the real time delivery time to the customer . . . so that delivery time could be used by the customer as criteria for determining which food item to order before beginning any transaction,” without even attempting to demonstrate that a person having ordinary skill in the art at the time of the invention would have reasonably expected such result.

If the Examiner intends to assert that a teaching, suggestion, or motivation to combine *Cupps* and *Hanson* or *Cupps* and *Harrington* could have been found in information generally available to a person having ordinary skill in the art at the time of the invention, the Examiner must provide documentary evidence that such information was in fact generally available to a person having ordinary skill in the art at the time of the invention, as governing Federal Circuit case law and the M.P.E.P. require. Moreover, If the Examiner intends to rely on information that was generally available to a person having ordinary skill in the art at the time of the invention to demonstrate that the purported results of the proposed combinations would have been expected by a person having ordinary skill in the art at the time of the invention, the Examiner must provide documentary evidence that such information was in fact generally available to a person having ordinary skill in the art at the time of the invention, as governing Federal Circuit case law and the M.P.E.P. require. The Examiner has refused to do so in each case. Instead, the Examiner states in the Advisory Action mailed August 13, 2004, that “general knowledge in the art motivates the combination and there is no requirement for documentary evidence.” Appellant disagrees with the Examiner. As the M.P.E.P. states, “[i]t

is never appropriate to rely solely on “common knowledge” in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based.” M.P.E.P. ch. 2143.03(A) (Rev. 2, May 2004). “Ordinarily, there must be some form of evidence in the record to support an assertion of common knowledge.” M.P.E.P. ch. 2143.03(B) (Rev. 2, May 2004). Moreover, “[i]f the examiner is relying on personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding.” M.P.E.P. ch. 2143.03(C) (Rev. 2, May 2004).

For at least these reasons, the proposed *Cupps-Hanson-Harrington* combination is improper and the Board should reverse the rejection of Appellant’s claims.

The Proposed *Cupps-Hanson-Harrington* Combination Fails to Disclose, Teach, or Suggest Limitations Recited in Independent Claims 1, 13, and 23-34

Even if the Examiner could properly combine *Cupps*, *Hanson*, *Harrington* with each other as proposed, the proposed *Cupps-Hanson-Harrington* combination would still fail to disclose, teach, or suggest limitations recited in independent Claims 1, 13, and 23-34. As an example, in the Response mailed February 11, 2004, Appellant noted that the proposed *Cupps-Hanson-Harrington* combination fails to disclose, teach, or suggest *one or more databases containing substantially real-time availability information identifying particular food items available from each of a plurality of unaffiliated sellers*, as recited in independent Claims 1, 13, and 23-24. In the Final Office Action mailed April 20, 2004, the Examiner responds that “Cupps discloses multiple unaffiliated vendors (108A-108M).” However, even assuming for the sake or argument that the vendors of *Cupps* could be properly considered *a plurality of unaffiliated sellers*, *Cupps* would still fail to disclose, teach, or suggest *one or more databases containing substantially real-time availability information identifying particular food items available from each of the vendors*, as recited in independent Claims 1, 13, and 23-24. *Cupps* merely discloses that an online ordering

machine retrieves data from an order database and a menu file system to generate a menu web page. Nowhere does *Cupps* disclose, teach, or even suggest that the order database or the menu file system contain any information that is *substantially real-time*, much less *substantially real-time availability information identifying particular food items*, as recited in independent Claims 1, 13, and 23-24.

As another example, in the Response mailed February 11, 2004, Appellant further noted that the proposed *Cupps-Hanson-Harrington* combination fails to disclose, teach, or suggest *substantially real-time delivery time information for the unaffiliated seller based at least in part on a current order backlog for the unaffiliated seller*, as recited in independent Claims 1, 13, and 23-24. In the Final Office Action mailed April 20, 2004, the Examiner responds that *Cupps* inherently discloses such *substantially real-time delivery time information* because, according to the Examiner:

[in *Cupps*,] it is the seller who provides the expected delivery time and therefore in order to provide an expected delivery time it must include any backlog or else the expected delivery time would have no meaning. In other words, it is necessary for the seller to consider any backlog in order to provide an expected delivery time.

(emphasis in original). Appellant disagrees with the Examiner. Even assuming for the sake of argument that the vendor in *Cupps* provided the expected delivery time, the vendor would not need to *base* the expected delivery time *at least in part on a current order backlog for the unaffiliated seller*, as recited in independent Claims 1, 13, and 23-24. As an example, the vendor in *Cupps* could determine the expected delivery time based solely on a relationship—such as a distance—between a location of the vendor and a location of the customer. According to *Cupps*, the vendor merely “indicate[s] how long the order will take to deliver.” (Column 11, Lines 11-12). It is entirely possible that such an indication would indicate nothing more than a transit time from the location of the vendor to the location of the seller. Nowhere does *Cupps* disclose, teach, or suggest in any way that the vendor indication of “how long the order will take to deliver” is *based at least in part on a current order backlog*

for the unaffiliated seller, much less **necessarily** based at least in part on a current order backlog for the unaffiliated, as inherency requires.

As yet another example, in the Response mailed February 11, 2004, Appellant further noted that the proposed *Cupps-Hanson-Harrington* combination fails to disclose, teach, or suggest **a food order transaction broker operable to generate a list of one or more unaffiliated sellers of the requested particular food item according to a comparison of the requested particular food item with the substantially real-time availability information for each unaffiliated seller**, as recited in independent Claim 1 and in substantially similar form in independent Claims 13 and 23-24. In the Final Office Action mailed April 20, 2004, the Examiner responds that *Cupps* discloses a vendor providing a delivery time that, according to the Examiner, is real-time and further that *Harrington* discloses a delivery time based on location that, again according to the Examiner, is real-time. Appellant respectfully submits that, even assuming for the sake of argument that the Examiner were correct, such disclosures would in no way disclose, teach, or suggest **a food order transaction broker operable to generate a list of one or more unaffiliated sellers of the requested particular food item according to a comparison of the requested particular food item with the substantially real-time availability information for each unaffiliated seller**, as recited in independent Claim 1 and in substantially similar form in independent Claims 13 and 23-24.

As discussed above, *Cupps* merely discloses that an online ordering machine retrieves data from an order database and a menu file system—neither of which contain **substantially real-time availability information identifying particular food items**—to generate a menu web page. *Cupps* provides the following example: in response to a customer request for pizza, the online ordering machine generates a menu web page showing the first five pizza restaurants that deliver to a location of the customer. (Column 9, Lines 18-20). According to *Cupps*, “the restaurants shown are selected based on the customer’s location and the restaurant’s delivery area.” (Column 9, Lines 20-21). Even assuming for the sake of argument that the menu web page in *Cupps* could be properly considered **a list of one or**

more unaffiliated sellers of the requested particular food item, *Cupps* would still fail to disclose, teach, or even suggest that the online ordering machine in any way *compares* the customer request for pizza with any *substantially real-time availability information identifying particular food items available from each of a plurality of unaffiliated sellers* to generate the menu web page.

Hanson fails to make up for these deficiencies of *Cupps*. *Hanson* merely discloses a central processing system estimating a delivery time to a customer and notifying a data entry station if an unusual delay in delivery is expected. (Column 16, Lines 64-68). Nowhere does *Hanson* disclose, teach, or suggest that the estimated delivery time or the notification of unusual delay in *Hanson* includes *substantially real-time delivery time information for the unaffiliated seller based at least in part on a current order backlog for the unaffiliated seller*, as recited in independent Claims 1, 13, and 23-24.

Harrington also fails to make up for these deficiencies of *Cupps*. *Harrington* merely discloses a hierarchical or nested menu system guiding a user through a class of available products. (Column 5, Lines 35-40). Nowhere does *Harrington* disclose, teach, or suggest that information on the class of available products in any way includes *substantially real-time availability information*, as recited in independent Claims 1, 13, and 23-24. In addition, nowhere does *Harrington* disclose, teach, or suggest that the hierarchical or nested menu system *generates a list of one or more unaffiliated sellers of the requested particular food item*, as recited in independent Claims 1, 13, and 23-24. In the Final Office Action mailed April 20, 2004, the Examiner states that, “for something to be hierarchical it must include a comparison to determine the hierarchical order.” However, even assuming for the sake of argument that the hierarchical or nested menu system in *Harrington* includes a comparison, because the hierarchy or nesting of the menu system precedes any user interaction with hierarchical or nested menu system, such comparison necessarily excludes *a comparison involving the requested particular food item*, as recited in independent Claims 1, 13, and 23-24.

For at least these reasons, neither *Cupps, Hanson, Harrington*, nor their proposed combination discloses, teaches, or suggest limitations recited in independent Claims 1, 13, and 23-24 and the Board should reverse the rejection of Appellant's claims.

Conclusion

Appellant has demonstrated that the present invention, as claimed, is clearly patentable over the prior art cited by the Examiner. Therefore, Appellant respectfully requests the Board of Patent Appeals and Interferences to reverse the final rejection of the Examiner and instruct the Examiner to issue a notice of allowance of all claims.

Appellant has enclosed a check in the amount of \$340.00 for this Appeal Brief. Appellant believes no additional fees are due. However, the Commissioner is hereby authorized to charge any additional fees or credit any overpayments to Deposit Account No. 02-0384 of Baker Botts L.L.P.

Respectfully submitted,

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Appendix A

1. A system for brokering food order transactions among a plurality of unaffiliated sellers, comprising:

one or more databases containing:

delivery information associated with each of a plurality of buyers;

substantially real-time availability information identifying particular food items available from each of a plurality of unaffiliated sellers;

pricing information for the particular food items available from each unaffiliated seller; and

delivery information for each unaffiliated seller comprising a delivery area for the unaffiliated seller and substantially real-time delivery time information for the unaffiliated seller based at least in part on a current order backlog for the unaffiliated seller; and

a food order transaction broker operable to:

receive a request for at least one particular food item from a buyer;

generate a list of one or more unaffiliated sellers of the requested particular food item according to a comparison of the requested particular food item with the substantially real-time availability information for each unaffiliated seller and a comparison of the delivery information for the buyer with the delivery area of each unaffiliated seller, the list reflecting the pricing information for the requested particular food item for each listed unaffiliated seller and the substantially real-time delivery time information for each listed unaffiliated seller; and

initiate a food order transaction concerning the requested particular food item with a particular listed unaffiliated seller selected from the list.

2. The system of Claim 1, wherein the buyer delivery information is selected from the group consisting of a buyer area code, a buyer city, a buyer zip code, and a buyer street address.

3. The system of Claim 1, wherein the pricing information for at least one of the particular food items reflects a currently available special offer for the particular food item.

4. The system of Claim 1, wherein the substantially real-time delivery time information for at least one of the listed sellers comprises an estimated delivery time determined based on one or more actual delivery times for the listed seller within a predetermined time period preceding the request.

5. The system of Claim 1, wherein the substantially real-time delivery time information for at least one of the listed sellers comprises a recent actual delivery time for the listed seller.

6. The system of Claim 1, wherein the broker is further operable to rank the listed sellers according to at least the substantially real-time delivery time information for each listed seller.

7. The system of Claim 1, wherein:
the one or more databases further contain preference information for the buyer; and
the broker is operable to generate the list according to the preference information for the buyer, the list excluding any sellers for which the pricing information or the substantially real-time delivery time information does not satisfy the preference information for the buyer.

8. The system of Claim 1, wherein the broker is further operable to communicate to the buyer a suggested alternative particular food item available from one or more of the sellers, along with the pricing information and substantially real-time delivery time information for the alternative particular food item for each of these sellers, if the substantially real-time delivery time information for one or more of the listed sellers exceeds a threshold.

9. The system of Claim 1, wherein the substantially real-time availability information for at least one of the sellers comprises substantially real-time availability information reflecting a current shortage of one or more particular food items normally available from the seller.

10. The system of Claim 1, wherein:
the one or more databases further contain rating information for one or more of the sellers; and
the broker is further operable to communicate to the buyer the rating information for at least one listed seller in association with the pricing and substantially real-time delivery time information for the listed seller.

11. The system of Claim 1, wherein the broker is further operable to:
communicate the list to the buyer;
receive from the buyer a selection of a particular listed seller; and
initiate the food order transaction with the particular listed seller in response to the selection.

12. The system of Claim 1, wherein the broker is further operable to select the particular listed seller automatically according to at least the substantially real-time delivery time information for all of the listed sellers.

13. Software for brokering food order transactions among a plurality of unaffiliated sellers, the software being embodied in a computer-readable medium and when executed by a computer operable to:

receive a request for at least one particular food item from a buyer;

access one or more databases containing:

delivery information for the buyer;

substantially real-time availability information identifying particular food items available from each of a plurality of unaffiliated sellers;

pricing information for the particular food items available from each unaffiliated seller; and

delivery information for each unaffiliated seller comprising a delivery area for the unaffiliated seller and substantially real-time delivery time information for the unaffiliated seller based at least in part on a current order backlog for the unaffiliated seller;

generate a list of one or more unaffiliated sellers of the requested particular food item according to a comparison of the requested particular food item with the substantially real-time availability information for each unaffiliated seller and a comparison of the delivery information for the buyer with the delivery area of each unaffiliated seller, the list reflecting the pricing information for the requested particular food item for each listed unaffiliated seller and the substantially real-time delivery time information for each listed unaffiliated seller; and

initiate a food order transaction concerning the requested particular food item with a particular listed unaffiliated seller selected from the list.

14. The software of Claim 13, wherein the buyer delivery information is selected from the group consisting of a buyer area code, a buyer city, a buyer zip code, and a buyer street address.

15. The software of Claim 13, wherein the pricing information for at least one of the particular food items reflects a currently available special offer for the particular food item.

16. The software of Claim 13, further operable to rank the listed sellers according to at least the substantially real-time delivery time information for each listed seller.

17. The software of Claim 13, wherein:
the one or more databases contain preference information for the buyer; and
the software is further operable to generate the list according to the preference information for the buyer, the list excluding any sellers for which the pricing information or the substantially real-time delivery time information does not satisfy the preference information for the buyer.

18. The software of Claim 13, further operable to initiate communication to the buyer of a suggested alternative particular food item available from one or more of the sellers, along with the pricing information and substantially real-time delivery time information for the alternative particular food item for each of these sellers, if the substantially real-time delivery time information for one or more of the listed sellers exceeds a threshold.

19. The software of Claim 13, wherein the substantially real-time availability information for at least one of the sellers comprises substantially real-time availability information reflecting a current shortage of one or more particular food items normally available from the seller.

20. The software of Claim 13, wherein:
the one or more databases contain rating information for one or more of the sellers;
and
the software is further operable to initiate communication to the buyer of the rating information for at least one listed seller in association with the pricing and substantially real-time delivery time information for the listed seller.

21. The software of Claim 13, further operable to:
initiate communication of the list to the buyer;
receive from the buyer a selection of a particular listed seller; and
initiate the food order transaction with the particular listed seller in response to the selection.

22. The software of Claim 13, further operable to select the particular listed seller automatically according to at least the substantially real-time delivery time information for all of the listed sellers.

23. A system for brokering food order transactions among a plurality of unaffiliated sellers, comprising:

means for storing:

delivery information associated with each of a plurality of buyers;

substantially real-time availability information identifying particular food items available from each of a plurality of unaffiliated sellers;

pricing information for the particular food items available from each unaffiliated seller; and

delivery information for each unaffiliated seller comprising a delivery area for the unaffiliated seller and substantially real-time delivery time information for the unaffiliated seller based at least in part on a current order backlog for the unaffiliated seller;

means for receiving a request for at least one particular food item from a buyer;

means for generating a list of one or more unaffiliated sellers of the requested particular food item according to a comparison of the requested particular food item with the substantially real-time availability information for each unaffiliated seller and a comparison of the delivery information for the buyer with the delivery area of each unaffiliated seller, the list reflecting the pricing information for the requested particular food item for each listed unaffiliated seller and the substantially real-time delivery time information for each listed unaffiliated seller; and

means for initiating a food order transaction concerning the requested particular food item with a particular listed unaffiliated seller selected from the list.

24. A computer-implemented method of brokering food order transactions among a plurality of unaffiliated sellers, the method performed using a computer system comprising one or more processing units, the method comprising:

using the one or more processing units, receiving a request for at least one particular food item from a buyer;

using the one or more processing units, accessing one or more databases containing:

delivery information for the buyer;

substantially real-time availability information identifying particular food items available from each of a plurality of unaffiliated sellers;

pricing information for the particular food items available from each unaffiliated seller; and

delivery information for each unaffiliated seller comprising a delivery area for the unaffiliated seller and substantially real-time delivery time information for the unaffiliated seller based at least in part on a current order backlog for the unaffiliated seller;

using the one or more processing units, generating a list of one or more unaffiliated sellers of the requested particular food item according to a comparison of the requested particular food item with the substantially real-time availability information for each unaffiliated seller and a comparison of the delivery information for the buyer with the delivery area of each unaffiliated seller, the list reflecting the pricing information for the requested particular food item for each listed unaffiliated seller and the substantially real-time delivery time information for each listed unaffiliated seller; and

using the one or more processing units, initiating a food order transaction concerning the requested particular food item with a particular listed unaffiliated seller selected from the list.

25. The method of Claim 24, wherein the buyer delivery information is selected from the group consisting of a buyer area code, a buyer city, a buyer zip code, and a buyer street address.

26. The method of Claim 24, wherein the pricing information for at least one of the particular food items reflects a currently available special offer for the particular food item.

27. The method of Claim 24, wherein the substantially real-time delivery time information for at least one of the listed sellers comprises an estimated delivery time determined based on one or more actual delivery times for the listed seller within a predetermined time period preceding the request.

28. The method of Claim 24, wherein the substantially real-time delivery time information for at least one of the listed sellers comprises a recent actual delivery time for the listed seller.

29. The method of Claim 24, further comprising using the one or more processing units, ranking the listed sellers according to at least the substantially real-time delivery time information for each listed seller.

30. The method of Claim 24, wherein:
the one or more databases contain preference information for the buyer; and
the method further comprises generating the list according to the preference information for the buyer, the list excluding any sellers for which the pricing information or the substantially real-time delivery time information does not satisfy the preference information for the buyer.

31. The method of Claim 24, further comprising using the one or more processing units, communicating to the buyer a suggested alternative particular food item available from one or more of the sellers, along with the pricing information and substantially real-time delivery time information for the alternative particular food item for each of these sellers, if the substantially real-time delivery time information for one or more of the listed sellers exceeds a threshold.

32. The method of Claim 24, wherein the substantially real-time availability information for at least one of the sellers comprises substantially real-time availability information reflecting a current shortage of one or more particular food items normally available from the seller.

33. The method of Claim 24, wherein:
the one or more databases contain rating information for one or more of the sellers;
and

the method further comprises using the one or more processing units, communicating to the buyer the rating information for at least one listed seller in association with the pricing and substantially real-time delivery time information for the listed seller.

34. The method of Claim 24, further comprising:
using the one or more processing units, communicating the list to the buyer;
using the one or more processing units, receiving from the buyer a selection of a particular listed seller; and
using the one or more processing units, initiating the food order transaction with the particular listed seller in response to the selection.

35. The method of Claim 24, further comprising using one or more processing units, selecting the particular listed seller automatically according to at least the substantially real-time delivery time information for all of the listed sellers.

36. The software of Claim 13, wherein the substantially real-time delivery time information for at least one of the listed sellers comprises an estimated delivery time determined based on one or more actual delivery times for the listed seller within a predetermined time period preceding the request.

37. The software of Claim 13, wherein the substantially real-time delivery time information for at least one of the listed sellers comprises a recent actual delivery time for the listed seller.

Appendix B

Appendix D